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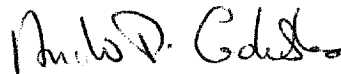
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Re: Ex Parte No. 582, Public Views on Major Rail
Consolidations

Dear Secretary Williams:

Enclosed for filing are a signed original and 25 copies of Comments of North America Freight Car Association in Response to Advance Notice of Proposed Rulemaking in the above-captioned case. Also enclosed is a diskette in WordPerfect 5.1 containing the same document.

Sincerely,



Andrew P. Goldstein
Attorney for
North American Freight Car
Association

Enclosures

APG/rmm

1986/0

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

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**COMMENTS OF NORTH AMERICA FREIGHT CAR ASSOCIATION
IN RESPONSE TO ADVANCE NOTICE OF
PROPOSED RULEMAKING**

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Attorney for
North America Freight Car
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Dated: May 16, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

**COMMENTS OF NORTH AMERICA FREIGHT CAR ASSOCIATION
IN RESPONSE TO ADVANCE NOTICE OF
PROPOSED RULEMAKING**

I.

North America Freight Car Association ("NAFCA") is an unincorporated association of over 20 companies that manufacture, own, lease, or operate upward of 300,000 private rail freight cars.

NAFCA is participating in this proceeding solely to request that any new rail merger rules adopted by the Board contain provisions that make railroads completely liable for those post-merger operating failures that negatively impact the value of private cars to those who lease, own, or otherwise operate those cars.

II.

Over half of all rail cars now are supplied by parties other than railroads, including private car operators such as NAFCA

members. Shippers operate their own cars not out of any great desire to purchase railroad assets or enter the railroad business, but because railroads either flatly refuse to acquire certain types of cars (e.g., tank cars) or are unwilling to acquire other types of cars in sufficient quantity to meet either normal or peak demand. Many individual shippers, including NAFCA members, operate private car fleets significantly larger than the number of cars operated by most individual short line railroads; indeed, various shippers' private car fleets cost more than many short line railroads are worth.

Shippers gauge the extent of their private car investments carefully, based on the number of periodic trips which they estimate will be necessary to transport their commodities between the origins and destinations in their market sphere. This assessment relies heavily on the level of carrier performance in the movement of both loaded and empty cars; i.e., loaded and empty transit time between loading and unloading points. Shippers normally divide the monthly ownership or rental cost of a car, including normalized maintenance, insurance, and taxes, by the number of trips which the car is anticipated to make over the same period of time to arrive at a per trip, per ton delivered, per bushel, or other unit cost for the car. These costs become part of the shipper's operating cost calculations.

When rail performance fails, as it did after the Burlington Northern-Santa Fe, Union Pacific-Southern Pacific, and Norfolk Southern-CSX-Conrail transactions, transit times are lengthened,

often substantially, producing a devaluation of a car's unit worth and a marked increase in the delivered cost of the goods moved in that car. A covered hopper car may cost \$400 a month to operate. If it makes two trips per month, the cost is \$200 per trip; at one trip per month, the cost doubles to \$400 per trip. If the car carries 4,000 bushels of grain, this decrease in utilization increases the car component of the transportation cost from \$.05 per bushel for each of two trips to \$.10 per bushel for each trip, an increase which is likely to consume most of, if not exceed, the trading margin on that grain. The rental or ownership value of the car is cut in half in relation to cost.

III.

When post-merger operating problems have caused such decreases in private car utilization, shippers have sought to recover their increased costs from the carriers involved. If the shipper has had to utilize trucks to replace stalled rail cars, the railroad sometimes compensates the shipper for those additional costs. If the shipper has had to augment its private fleet with additional cars to make up for decreased utilization of the pre-merger fleet, some portion of the fleet augmentation costs may be recognized, as well. But, almost uniformly, when shippers seek to recover their increased expenses resulting from diminished private car utilization following post-merger service problems, those claims are rejected. Carriers state that they do not recognize these types of claims.

IV.

NAFCA urges the Board to incorporate into its merger rules a condition which would require railroads merging or consolidating with Board approval to be responsible for all commercial and cost consequences of their merger as it applies to private cars, including, without limitation, responsibility for the diminished value of the cars to their operators.

NAFCA is not requesting the Board to mandate damage payments on demand; shippers should be required to establish, in the appropriate forum, the actual extent of the diminution experienced in car utilization and, therefore, in car value. NAFCA simply is requesting the Board to make clear, in its merger conditions, that such damages are cognizable, where proven.

The Board's regulations also should address standards of appropriate proof of damages, in general. This request is based on the assertion, by at least one railroad, that average fleet performance is not an acceptable standard for an assessment of damages. Rather, that carrier has requested the production of a car-by-car history of use and performance to be measured against a post-merger analysis of the same car's performance. This type of presentation overly taxes the ability of shippers to compile and make claims. There is a far more workable alternative. If a claim is presented on the basis of average data, and the carrier has some reason to believe that a claim presented in that manner is unrepresentative of any specific situation, the carrier should be

required to refute the claim since it has in its possession all of the necessary car performance records with which to do so.

In summary, NAFCA urges the Board to include in its merger rules the following conditions:

1. Railroads must agree to be liable for all damages imposed on private cars as such, including, without limitation, increased ownership or rental costs resulting from diminished car utilization, subject to proof of loss; and

2. No unreasonable standards of proof be imposed, and that shippers be permitted to establish a prima facie case of loss based on average performance data, subject to the right of the carrier to attempt to refute the use of average data with car-specific data in accordance with due process.

Respectfully submitted,



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Attorney for
North America Freight Car
Association

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing pleading to be served on all parties of record by first-class mail, postage prepaid, this 16th day of May, 2000.



Andrew P. Goldstein